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In the Supreme Court of the United States

OCTOBER TERM, 1979

FREZZO BROTHERS, INC., GUIDO FREZZO AND JAMES FREZZO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17a-33a) is reported at 602 F. 2d 1123. The opinion of the district court (Pet. App. 1a-16a) is reported at 461 F. Supp. 266.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1979. A petition for rehearing (Pet. App. 34a) was denied on October 22, 1979. The petition for a writ of certiorari was filed on November 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether the Administrator of the Environmental Protection Agency must issue a compliance order or bring a civil enforcement action prior to the institution of criminal proceedings under Section 309(c)(1) of the Water Act of 1972, 33 U.S.C. 1319(c)(1).

2. Whether a criminal prosecution under Section 309(c)(1) can be initiated if the Administrator has not issued effluent limitations under Section 301 of the Water Act, 33 U.S.C. 1311.

STATUTE INVOLVED

The pertinent provisions of the Federal Water Pollution Control Act Amendments of 1972,[1] 33 U.S.C. 1251 *et seq.*, are as follows:

Section 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law.

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Section 1319. Enforcement

(a) State enforcement; compliance orders

(1) * * *

(2) * * *

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, or 1318 of this title, or is in violation of any permit condition or limitation implementing any

[1]Hereinafter the "Water Act." The Water Act was further amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566.

of such sections in a permit issued under section 1342 of this title by him or by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Any person who willfully or negligently violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under Section 1342 of this title by the Administrator or by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not

more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

Section 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

STATEMENT

In a six-count indictment, petitioners James L. Frezzo, Guido Frezzo and Frezzo Brothers, Inc., were charged with willfully and negligently discharging pollutants—waste water from mushroom compost manufacturing operations—into the East Branch of the White Clay Creek, a navigable water of the United States, without having obtained a discharge permit, in violation of Sections 301(a) and 309(c) of the Water Act, 33 U.S.C. 1311(a) and 1319(c). A jury convicted petitioners on all six counts. The trial court imposed thirty day jail sentences and a total fine of $50,000 upon the individual defendants and a $50,000 fine upon the corporate defendant. In affirming the convictions the court of

appeals held: (1) "that the Administrator of the EPA is not required to pursue administrative or civil remedies, or give notice, before invoking criminal sanctions" (Pet. App. 25a); (2) "that the promulgation of effluent limitation standards is not a prerequisite to the maintenance of a criminal proceeding" (*id.* at 29a); (3) "that there was sufficient evidence to sustain the verdict on all six counts" (*id.* at 31a); and (4) "that the trial judge did not abuse his discretion in declining to submit a special verdict" (*id.* at 32a).

The operative facts may be summarized as follows. Petitioners are engaged in mushroom compost manufacturing and mushroom farming (*id.* at 7a, 20a). The convictions at issue stem from the former operation in which petitioners produce the medium used for growing mushrooms. The process involves periodically adding water to a mixture of hay and horse manure piled on a concrete wharf in the open air so that it will ferment (Pet. 6; Pet. App. 7a, 21a). Water is introduced to the mixture both by rain and snow and by a water circulation system (Pet. 6). Part of that system is a concrete holding tank that catches runoff from the composting wharf, and recycles it to the wharf (*ibid.*; Pet. App. 7a, 21a). Nearby is a wholly separate storm water runoff system leading from petitioners' farm to a channel box on adjoining property, and from there to an unnamed tributary of the East Branch of White Clay Creek (Pet. App. 7a, 21a). When petitioners' composting holding tank overflowed, polluted water would find its way to the separate storm water system and from there into the channel box and ultimately the stream (*id.* at 22a; see also *id.* at 8a).

On four occasions during 1977 and two during 1978, pollutant discharges traceable to the Frezzo compost holding tank were discovered in the White Clay Creek. These six discharges formed the basis for the indictment (*id.* at 21a-22a).

ARGUMENT

As framed by the petition, the question presented blends two discrete and settled issues: (1) whether a compliance order or civil action must precede criminal enforcement action under the Water Act, and (2) whether effluent limitations must be promulgated prior to commencement of criminal proceedings. The answer in each case is clear; petitioners point to no conflict among the circuits on either, and neither presents an important issue of federal law meriting resolution by this Court.

1. Petitioners submit (Pet. 7-9) that before a criminal action under 33 U.S.C. 1319(c) can be brought, the EPA Administrator must issue a compliance order or bring a civil action under 33 U.S.C. 1319(a)(3) and 1319(b). The court of appeals correctly rejected this claim for which petitioners marshal no legal support.

The language of the statute does not justify the conclusion that criminal liability can arise only after warning by one of the noncriminal methods at the EPA Administrator's disposal. As the court of appeals noted, "[t]here is nothing in the text of §1319(c) that compels the conclusion that prior written notice, other administrative or civil remedies are prerequisite to criminal proceedings under [Section 1319]" (Pet. App. 24a). Although subsection (a)(3) provides that "[w]henever * * * the Administrator finds that any person is in violation of section 1311 * * * he shall issue an order

requiring such person to comply with such section * * * or he shall bring a civil action in accordance with subsection (b) * * *," these steps are not mandatory. See *Sierra Club* v. *Train*, 557 F. 2d 485, 490-491 (5th Cir. 1977). Moreover, whether they are mandatory or discretionary, nothing in the language or structure of Section 1319, or the Water Act as a whole, conditions the Administrator's authority to commence criminal proceedings under subsection (c) on his having taken the steps outlined in subsection (a) (3). Section 1319(c)(1) constitutes an independent enforcement mechanism. "Any person who wilfully or negligently violates section 1311 * * * shall be punished by a fine * * * or by imprisonment * * * or by both" (*ibid.*). The language could scarcely be clearer.

The legislative history reinforces this conclusion. As the court of appeals observed (Pet. App. 23a-24a) (footnote omitted):

> [T]he final House Committee Report * * * clearly indicate[s] that written notice of the violation, administrative, civil or criminal remedies under the Act were to be *alternative* remedies. The key portion of the House Committee Report provides:
>
> "Whenever on the basis of any information available to him the Administrator finds that anyone is in violation of any of these requirements, he *may* take *any* of the following enforcement actions: (1) he shall issue an order requiring compliance; (2) he shall notify the person in alleged violation in such state of such finding . . . or (3) he shall bring a civil action; or (4) he shall cause to be instituted criminal proceedings."

Legislative History, *supra* at 801-02 (emphasis supplied). This statement led the court in *Phelps Dodge* [391 F. Supp. 1181 (D. Ariz. 1975)] to conclude that the Administrator "is not required to proceed first to effect a correction by civil means before instituting criminal proceedings." 391 F. Supp. at 1184. An identical result was reached by the court in *U.S.* v. *Hudson Farms, Inc.*, 12 E.R.C. 1144, 1146 (E.D. Pa. 1978).

We believe that these cases place a correct gloss on the enforcement provisions of the Act. * * * The Senate acceded to the House in not making civil enforcement mandatory upon the Administrator under section 1319. *Legislative History*, *supra* at 174. Hence, we can only conclude that whatever support existed for the position urged by the Frezzos did not prevail in the enactment of the final Bill.

2. Nor is there any merit in petitioners' contention (Pet. 7-11) that the Administrator cannot initiate criminal proceedings under the Water Act unless and until applicable effluent limitations have been promulgated. Again, the text of the statute is clear. Section 1311(a)—characterized by the court of appeals as the "core provision of the Act" (Pet. App. 26a) and by the Sixth Circuit as the "broad primary declaration of the Act" (*United States* v. *Hamel*, 551 F. 2d 107, 109 (1977))—states: "Except as in compliance with this section and [other specified] sections * * * of this title, the discharge of any pollutant by any person shall be unlawful." Thus, the basic concept underlying the Water Act is a flat ban on pollutants, subject to limited exceptions.

Section 1311(b) provides for the promulgation of effluent limitations which take account of the limits of pollution control technology while assuring progress toward "the national goal of eliminating the discharge of all pollutants." Compliance with applicable limitations is one of the exceptions to the overall ban imposed by Section 1311(a). However, it does not follow that the *absence* of applicable limitations constitutes an exception as well. Rather, as the court of appeals concluded, "[i]f no effluent limitations have yet been applied to an industry, a potential transgressor should apply for a permit to discharge pollutants under section 1342(a). The Administrator may then set up operating conditions until permanent effluent limitations are promulgated by EPA" (Pet. App. 28a).[2] Absent a permit, if no limitations are in effect the primary ban of Section 1311(a) remains in force. Otherwise Section 1342(a), insofar as it expressly applies to the issuance of permits "prior to the taking of necessary implementing actions relating to" effluent limitations, would be rendered superfluous.

More importantly, the rule contended for by petitioners is incompatible with the purposes of the Water Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and to eliminate "the discharge of pollutants into the navigable waters by 1985" (33 U.S.C. 1251). As the court of appeals observed, the "EPA cannot be expected to

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[2]It is clear that Congress, recognizing that effluent limitations would not be promulgated immediately, intended that in the interim persons desiring to discharge pollutants first obtain permits under Section 1342. H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 100, 126 (1972); S. Rep. No. 92-414, 92d Cong., 1st Sess. 42 (1971). See also *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 133 n.24 (1977).

have anticipated every form of water pollution through the establishment of effluent limitations" (Pet. App. 28a-29a). To prohibit enforcement of the Act until such limitations have been promulgated would mean that "dangerous pollutants could be continually injected into the water solely because the administrative process has not yet had the opportunity to fix specific effluent limitations. Such a result would be inconsistent with the policy of the Act" (*id.* at 28a).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3]Petitioners suggest in passing (Pet. 10-11) that the decision below is infirm because the court of appeals did not consider whether their activities fall within an agricultural exception to Section 1342's permit requirements. See 40 C.F.R. 125.4. This contention was first raised in petitioners' out-of-time petition for rehearing which the court of appeals denied without opinion (Pet. App. 34a). Accordingly, the issue is not properly before this Court.